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No. 95-508

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROBERT W. KEARNS,
Petitioner,
v.

CHRYSLER MOTORS CORPORATION,
AMERICAN MOTORS CORPORATION,
KLH, PROFESSIONAL CORPORATION,
REED, SMITH, SHAW and MCCLAY, P.C.,
ARNOLD, WHITE & DURKEE, CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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RESPONDENT ARNOLD, WHITE & DURKEE'S MEMORANDUM OPPOSING CERTIORARI

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9 pp

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
ARGUMENT	5
CONCLUSION	7

TABLE OF AUTHORITIES

Cases

Kearns v. Ford Motor Co., Civil Act. No. 78-70740 (E.D. Mich.)	2
Kearns v. Chrysler Corp., Civil No. 82-70748 (E.D. Mich. Oct. 26, 1992), *aff'd*, 32 F.3d 1541 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 1392 (1995)	2, 3
Kearns v. Chrysler Corp., Civil No. 82-70748 (E.D. Mich. Aug. 26, 1994), *appeal dism'd*, No. 95-1016 (Fed Cir. Feb. 13, 1995)	3, 4
Kearns v. Chrysler Motors Corp., No. 95-1334 (Fed. Cir. June 28, 1995)	4, 5

Rules

Fed. R. App. P. 40(a)	4
S. Ct. R. 29.1	1

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Respondent Arnold, White & Durkee ("AW&D"), a Texas corporation, is a 120-attorney law firm with a national practice principally devoted to intellectual property litigation, including patents, trademarks, copyrights, and trade secrets.[1] The petitioner, Dr. Robert W. Kearns, is the inventor of several U.S. patents concerning intermittent windshield wiper control systems for automobiles, which have been the subject of protracted patent litigation between Dr. Kearns and nearly every automobile

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[1] Pursuant to S. Ct. R. 29.1, AW&D states that it has no parents, subsidiaries, or related companies.

manufacturer in the world. The first infringement action was filed in 1978 and every Kearns patent involved expired before September 1988. Dr. Kearns is currently proceeding *pro se*.

As shown herein, Dr. Kearns' latest petition presents no issues which can properly be resolved by this Court at the current procedural stage of the proceedings. AW&D submits that when the Court becomes aware of the relevant procedural facts pertaining to this petition, those facts alone will demonstrate that the petition should be denied.

STATEMENT OF THE CASE

AW&D served as counsel to Dr. Kearns in a bellwether case involving several of Dr. Kearns' intermittent windshield wiper control patents, *Kearns v. Ford Motor Co.*, Civil Act. No. 78-70740 (E.D. Mich.) ("the *Ford* case"). AW&D also served as counsel to Dr. Kearns in *Kearns v. Chrysler Corp.*, Civil No. 82-70748 (E.D. Mich.) ("the *Chrysler* case"), until one week before the trial was scheduled. Dr. Kearns retained another law firm, Reed, Smith, Shaw & McClay ("RSS&M"), to represent him during the infringement portion of the latter trial against Chrysler, but discharged that firm after Chrysler's infringement was established. Dr. Kearns then appeared *pro se* during the subsequent damages trial in the *Chrysler* case.

This petition follows certain ancillary proceedings related to the *Chrysler* case. A jury trial in the *Chrysler* case resulted in an award of $18,740,465.43 in damages to Dr. Kearns. Pet. App. A-1. The district court's final judgment was the subject of separate appeals to the United States Court of Appeals for the Federal Circuit by both Dr. Kearns and Chrysler. After the district court's judgment was affirmed by the Federal Circuit, petitions for certiorari by both parties were denied. *Kearns v. Chrysler Corp.*, Civil No. 82-70748 (E.D. Mich. Oct. 26, 1992), *aff'd*, 32 F.3d 1541 (Fed. Cir. 1994), *cert.*

denied, 115 S. Ct. 1392 (1995). Those proceedings concluded the merits litigation in the *Chrysler* case.

AW&D and RSS&M each moved independently to recover their attorneys' fees from Dr. Kearns. After the district court exercised ancillary jurisdiction over those claims and awarded fees in favor of the two law firms, Dr. Kearns separately appealed the district court's determination. That appeal was dismissed for lack of jurisdiction for having been filed more than thirty (30) days after the district court's final attorneys' fee judgment. Pet. App. A-9 (*Kearns v. Chrysler Corp.*, Civil No. 82-70748 (E.D. Mich. Aug. 26, 1994), *appeal dism'd*, No. 95-1016 (Fed. Cir. Feb. 13, 1995)) ("the attorneys' fee appeal"). No petition for certiorari was filed by Dr. Kearns following that dismissal and, to the extent that his current petition seeks to raise any issues pertaining to the propriety or amount of attorneys' fees awarded to AW&D or RSS&M as a result of those proceedings, such petition would be well out of time.

Chrysler then sought interpleader, declaratory and injunctive relief against Dr. Kearns, AW&D, RSS&M, and several others having asserted claims to the proceeds of the Final Judgment.[2] The district court granted such relief by allowing Chrysler to pay $21,077,300.82 into an interest-bearing account with the district court in full satisfaction of the Final Judgment, by allocating and directing payment of the proceeds to the appropriate claimants, and by enjoining further action against Chrysler based on the Final Judgment. Pet. App. A-3; Pet. App. A-5.

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[2] The other parties were Vincent L. Barker, Jr., who served as a Special Master in several of Dr. Kearns' patent litigations; KLH Corporation, a Michigan law firm and corporation that provided legal services to Dr. Kearns, and Phyllis Kearns, Dr. Kearns' ex-wife who claimed a share of the damages under a divorce decree. All of the parties had a claim against Dr. Kearns and the proceeds in accordance with final judgments of various federal or state courts.

Dr. Kearns then filed his third notice of appeal related to the *Chrysler* case, which was docketed by the Federal Circuit on May 9, 1995. RSS&M moved to dismiss the entire appeal on May 18, 1995. After the official caption of that appeal was amended on June 14, 1995 to correct the inadvertent omission of AW&D as a defendant-appellee, AW&D moved on June 21, 1995 to dismiss the appeal with respect to AW&D on grounds of *res judicata* because Dr. Kearns' appeal only raised issues as to AW&D that had already been decided in the proceedings that were the subject of his two prior appeals. Shortly thereafter, the Federal Circuit granted both motions and dismissed the appeal. Pet. App. A-13 (*Kearns v. Chrysler Motors Corp.*, No. 95-1334 (Fed. Cir. June 28, 1995)) ("the interpleader appeal").[3]

On July 10, 1995, Dr. Kearns filed his opening merits brief in Appeal No. 95-1334, even though the appeal had been dismissed two weeks prior. On July 28, 1995, Dr. Kearns filed a motion for reconsideration without seeking leave to do so, even though petitions for rehearing are to be filed within 14 days of the decision. *See* Fed. R. App. P. 40(a). On August 30, 1995, he filed another motion to permit his acts to be done out of time combined with another motion for reconsideration. On that same date, Dr. Kearns filed a reply brief, even though no opposition briefs had been filed by any party due to the dismissal of the appeal. On September 1, 1995, Dr. Kearns filed an appendix.

On September 19, 1995, the Federal Circuit denied Dr. Kearns' motion for reconsideration and his supplemental motion for reconsideration. Pet. App. A-15. On September 18, 1995, Dr. Kearns filed another application seeking a suspension of the rules by the Federal Circuit. On

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[3] The caption on the Federal Circuit's June 28th order was the caption applicable to Appeal No. 95-1016 rather than the amended caption issued by that court on June 14, 1995 for use in Appeal No. 95-1334. Pet. App. A-13.

October 2, 1995, the Clerk of the Federal Circuit returned his last set of submissions to him on grounds that repetitive motions for reconsideration are not considered by that court. This petition followed.

ARGUMENT

The majority of Dr. Kearns' petition attempts to raise questions that have long since been decided, and interpretations of judicial decisions and events that have long since been rejected by the District Court and by the Court of Appeals. Dr. Kearns can no longer get an injunction or other equitable relief related to the infringement of his patents, which had expired by 1988 or earlier. This case should not be prolonged by Dr. Kearns' unwillingness to accept that finality.

Whether Dr. Kearns recognizes or agrees with the prior decisions and results is wholly irrelevant, the judicial process is now over with respect to the merits patent litigation and to the ancillary payment and fee disputes. Indeed, Dr. Kearns has already petitioned this Court on the patent merits issues and the time for a petition on his appeal from the ancillary fees issues has long since expired.

The only aspect of the proceedings related to the *Chrysler* case that can possibly be addressed by this petition is the Federal Circuit's dismissal of Dr. Kearns' latest appeal (No. 95-1334) of the district court's grant of Chrysler's supplemental request for interpleader relief. That action did nothing more than distribute funds that were paid by Chrysler to satisfy its adverse judgment in the infringement litigation to various claimants (including the respondents here) in accordance with prior judicial determinations by both federal and state courts.

The district court's underlying interpleader decision and distribution of the funds paid by Chrysler into the District Court was reasonable, fair, and correct. Judge Cohn of the United States District Court for the Eastern Dis-

trict of Michigan presided over all of Dr. Kearns' patent litigations, and was intimately familiar with Chrysler's desire to satisfy its adverse judgment and with the events and circumstances of Dr. Kearns' litigation, Dr. Kearns' behavior, and the role of each of the respondents in the ultimate outcome. No even arguable basis has been shown to alter the District Court's allocation of the deposited funds according to the prior final judicial awards.

Moreover, the Federal Circuit's dismissal of Dr. Kearns' appeal from that decision was itself correct and proper, and did not even implicate the merits of the District Court's decision. In its denial of Dr. Kearns' motion for reconsideration, the Court of Appeals observed:

> We have considered the arguments presented in Kearns's submission and find them to be not on point. Kearns is apparently seeking review of the merits of Arnold, White & Durkee and Reed Smith Shaw and McClay's entitlement to attorney fees, a matter encompassed by an earlier, dismissed appeal, not this appeal. Kearns presents no arguments relating to the merits of appeal no. 95-1334.

Pet. App. A-15 n.2. As before the Court of Appeals, Dr. Kearns does not address the merits of the interpleader orders in his petition; he just repeats his views as to the prior final judgments on the patent merits issues and on the fee awards.

CONCLUSION

There is no reason for this Court to grant certiorari to review the propriety of the Federal Circuit's dismissal in this particular case, which can have no effect on any persons or legal doctrine apart from momentarily reinstating Dr. Kearns' meritless and misfocused appeal. In turn, that appeal could only affect the distribution of funds to the proper claimants based on prior final judicial determinations. Because review of the Federal Circuit's dismissal is clearly not warranted by this Court, Dr. Kearns' petition should be denied.[4]

Respectfully submitted,

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[4] In light of the above procedural history of the case, AW&D does not believe that any additional information or citation of authority is necessary to dispose of Dr. Kearns' latest petition. If the Court wishes any additional briefing in opposition, AW&D will promptly provide it at the Court's direction.